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In The

Supreme Court of the United States

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MICHAEL RODAK, JR., CLE

October Term, 1973

No. 73-1542

VESCO & CO., INC.,

Petitioner,

vs.

INTERNATIONAL CONTROLS CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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VESCO & CO., INC.,

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INTERNATIONAL CONTROLS CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, International Controls Corp., respectfully prays that the petition for a writ of certiorari to review the judgment of the United States Court of Appeal for the Second Circuit, entered in this case on January 15, 1974, be denied.

QUESTIONS PRESENTED FOR REVIEW

1. Did the issuance of the District Court's Findings of Fact and Conclusions of Law, or the affirmance of the District Court's order by the Court of Appeals, violate principles of due process in such a way as to require the exercise of the Supreme Court's powers of supervision?

2. Was the Court of Appeal's decision affirming the District Court's denial of petitioner's motions to dismiss the complaint in conflict with decisions of other circuits or of this Court?

3. Was the Court of Appeal's decision affirming the District Court's granting of an injunction against the use, disposition or transfer of petitioner's primary asset in conflict with the decisions of other circuits or of this Court?

STATEMENT OF THE CASE

1. Basis for Federal Jurisdiction and the Institution of the Action

Respondent, International Controls Corp. (hereinafter referred to as "ICC"), instituted this action on June 7, 1973. The complaint generally alleged that certain of the named defendants, by means of interstate commerce and the national securities exchanges, defrauded respondent and its stockholders in violation of the Securities Exchange Act of 1934 (15 U.S.C. Section 78aa). This alleged violation of the securities laws is the basis for federal jurisdiction in this case.

The allegations of the complaint relate primarily to two main areas, namely, certain transactions by those designated in the complaint as "Vesco and his group" and certain named aiders and abettors, regarding assets and funds of IOS, Ltd. and other related companies, and certain other transactions by the same individuals regarding a Boeing 707 jet plane. Petitioner is named in the caption of this action (99a) [1], and is identified in paragraph 5(r) (105a) of the complaint.

With the exception of certain allegations involving a Boeing 707 airplane, which relate primarily to defendants Fairfield Aviation Corp., Fairfield General Corp., Skyways Leasing Corp. and Alwyn Eisenhauer, and which clearly do not involve petitioner, all of the remaining allegations contained in the complaint allege a scheme to defraud respondent commencing in or about 1970.

Petitioner is a Delaware corporation formed on July 12, 1972. The only business of petitioner is ownership of shares of the common stock of respondent. 800,000 shares of this stock was transferred to petitioner at the time of its incorporation by defendant Robert L. Vesco. Subsequently, an additional 46,380 shares were transferred to petitioner by Vesco's children. Petitioner's stock, in turn, is owned as follows: the preferred stock is held by Robert L. Vesco and the common stock is owned by Patricia J. Vesco as custodian for her children. The only officers of Vesco & Co., are Mrs. Vesco and Shirley Bailey, Vesco's personal secretary.

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1. Unless otherwise noted, references are to the Appendix filed by the petitioner herein.

2. The District Court Proceedings

On July 3, 1973, the United States District Court for the Southern District of New York (Hon. Charles E. Stewart, Jr., presiding), entered two orders granting various preliminary injunctive relief and denying petitioner's motion to dismiss the complaint on various jurisdictional grounds and for failure to state a claim upon which relief can be granted.

Specifically as they pertain to petitioner, the orders preliminarily enjoined petitioner from (a) "prosecuting or taking any steps in furtherance of an action entitled *Vesco & Co., Inc. v. Laurence B. Richardson, Jr., et al.*, Docket No. C-3448-72, pending in the Superior Court of New Jersey, Chancery Division, Bergen County," pending final determination of the instant case; and from (b) "directly or indirectly using, selling, encumbering, transferring, or otherwise disposing" of the stock of respondent which is held by petitioner (57a).

Based upon the complaint filed on June 7, 1973, as well as on certain supporting affidavits, respondent appeared before the District Court on or about June 7, 1973 and secured a temporary restraining order directed to petitioner which prohibited the "use", "disposition", "encumbrance", etc., of its primary asset, the stock of ICC.

On June 15, 1973, petitioner moved to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction and insufficiency of process. This motion was denied, without prejudice, by the District

Court and after a preliminary appearance by petitioner on June 18, 1973, the Court continued the temporary restraining order to an adjourned date on the order to show cause.

On June 22, 1973, respondent obtained an additional order to show cause, returnable June 27, 1973, why an order should not be issued preliminarily enjoining the further prosecution of the New Jersey state court action entitled *Vesco & Co., Inc. v. Laurence B. Richardson, Jr., et al.*, Docket No. C-3448-72.

Petitioner subsequently renewed its motion to dismiss the complaint on the grounds stated in its previous notice of motion of June 15, 1973 and additionally, for failure to state a claim upon which relief can be granted.

All of the foregoing matters came on for hearing before the District Court on June 27, 1973. Because of certain time pressures on the District Court, argument was not completed on June 22, 1973 and supplementary memoranda were invited by the Court, to be submitted no later than noon on Friday, June 29, 1973.

The Court expressed to counsel its intention that a decision would be rendered on Monday, July 2, 1973. Such memoranda were submitted by both counsel for petitioner and by counsel for respondent. David M. Butowsky, special counsel for respondent ICC, proceeded to submit an additional memorandum to the Court on Monday, July 2, 1973.

Respondent also submitted to the District Court on Monday, July 2, 1973, Proposed Findings of Fact and Conclusions of Law (63a) and two proposed orders (47a, 59a) and served these upon petitioner's counsel by mail.

On July 3, 1973, the District Court signed the orders submitted by respondent on Monday, July 2, 1973 and incorporated the Proposed Findings of Fact and Conclusions of Law (81a) into the signed orders.

These orders granted the preliminary injunctive relief described briefly above. After these orders were signed, counsel for petitioner objected on the grounds that petitioner had not been advised that respondent was submitting the Proposed Findings of Fact and Conclusions of Law and the proposed orders to the District Court. Upon being advised that petitioner's counsel had not had prior notice of these submissions, the District Court offered petitioner the opportunity to submit additional evidence by affidavit or by way of evidentiary hearing. Vesco & Co. declined to accept the Court's offer. Instead, petitioner took an appeal to the Court of Appeals for the Second Circuit on August 1, 1973.

3. The Decision of the Court of Appeals

Upon the appeal, which was consolidated for the purposes of oral argument on December 10, 1973, with the appeals of three other defendants and one intervenor in the action, the United States Court of Appeals for the Second Circuit affirmed all portions of the orders of the District Court with the exceptions of that part which had enjoined the further prosecution of the New Jersey state court action entitled *Vesco & Co., Inc. v. Laurence B. Richardson, Jr., et al.*

As to that segment of the order, the Court of Appeals modified and vacated so much of the preliminary injunction as had restrained Vesco & Co., Inc. from prosecuting the first three counts of its pending state court action. The injunction remained in effect as to the fourth count.

The opinion of the Court of Appeals, filed on January 15, 1974, affirmed, *inter alia*, the order of the District Court enjoining the disposition of the shares of respondent held by the petitioner and the order denying petitioner's motions to dismiss for lack of personal and subject matter jurisdiction, insufficient service of process and failure to state a claim upon which relief could be granted (26a-30a).

The contentions which petitioner makes here, namely, that its right to due process had been violated and that the District Court had erred in its denial of petitioner's various motions to dismiss, were fully considered by the Court of Appeals.

REASONS FOR DENYING PETITION

Introduction

In the proceedings below, the District Court, acting under the Securities Exchange Act of 1934, preliminarily enjoined petitioner Vesco & Co., Inc. from transferring certain shares of stock which had been transferred to it by defendant Robert Vesco. Concurrently, the District Court denied the motion of Vesco & Co., Inc. to dismiss the complaint as against it on various jurisdictional grounds. The Court of Appeals affirmed the District Court with respect to both determinations.

The essential finding of the District Court and of the Court of Appeals supporting the orders below was that it sufficiently appeared for purposes of jurisdiction and the issuance of a preliminary injunction that petitioner Vesco & Co., Inc. was the *alter ego* of defendant Robert Vesco.

Petitioner challenges the orders below on procedural and substantive grounds. It is, we submit, virtually dispositive of both the procedural and substantive errors assigned in the petition to point out that the finding by the Courts below that petitioner was the *alter ego* of defendant Robert Vesco was based on the following facts which were submitted to the District Court by the petitioner in an affidavit:

(a) Petitioner is a Delaware corporation formed on July 12, 1972 (after many of the wrongful acts alleged in the complaint). The only business of petitioner is the ownership of the more than 800,000 shares of common stock of respondent which were the subject of the injunction.

(b) 800,000 shares were transferred to petitioner at the time of its incorporation by defendant Robert L. Vesco. Subsequently, an additional 46,380 shares were transferred to petitioner by Vesco's children.

(c) The stock of Vesco & Co. is, in turn, owned as follows: the preferred stock is held by defendant Robert L. Vesco and the common stock is owned by Patricia J. Vesco, his wife, as custodian for their children.

(d) The only officers of defendant Vesco & Co. are Mrs. Vesco and Shirley Bailey, Vesco's personal secretary.

Because the foregoing facts were submitted by petitioner and were never in dispute, the Court of Appeals sustained the District Court's finding of *alter ego* status. We are at a loss to understand how the petitioner can complain in this Court of the foregoing finding or of the state of the record with respect to the underlying evidence supporting it.

We respectfully submit that the instant petition is even more unfounded when it is considered that petitioner was offered an immediate hearing by the District Court on all of the issues reflected in the Court's findings (including the *alter ego* question) and refused such a hearing. The matter is, therefore, before this Court as a review of the lower Court's exercise of powers in the earliest stages of the case to preserve claims under the 1934 Act and assets from which said claims might be satisfied. Although almost one year has elapsed since the institution of this litigation and over nine months since the District Court's injunction, petitioner has not sought to proceed to have said injunction dissolved by trial on the merits, but has instead continued to appeal even to this Court with respect to findings which, of necessity, must be deemed tentative by reason of the nature and stage of the proceedings at which they were made.

I.

THE ACTIONS OF THE COURTS BELOW DO NOT CONSTITUTE ANY VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS WHICH WOULD CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The gravamen of petitioner's argument is that it was deprived of procedural due process in light of the fact that the District Court adopted *in haec verba* findings of fact and conclusions of law submitted by respondent herein and that the District Court signed the accompanying orders submitted by respondent before such documents were actually received by the petitioner.

Respondent contends that, whether or not it would otherwise have been inappropriate for the District Court to adopt a litigant's proposed findings and conclusions *in toto*, such adoption in this case was proper and did not in any way prejudice petitioner. The Court of Appeals, in its opinion, specifically stated that it did not place heavy reliance upon the findings because they were "based solely on documentary evidence," (27a, fn. 20) which was itself before the Court of Appeals.

Furthermore, the District Court, when it realized that petitioner had not actually received the proposed findings and orders in question prior to the time the Court signed its order, offered petitioner an opportunity to submit further evidence by means of affidavit or by means of an evidentiary hearing. As the Court of Appeals also noted, petitioner declined this offer (27a, fn. 20).

Finally, although the petitioner argues that "the record is barren of evidential support for certain of the findings and conclusions with respect to petitioner," (Brief,[2] p. 14) we are unable to find any instance where this might be so. A careful re-examination of the findings of fact and conclusions of law in issue reveals that the only findings which are pertinent to the present petition are those numbered 3(d), 10, 11 and 16.

Finding 3(d) states that "Special Counsel claims to have found that . . . ." (65a, 83a). This statement was obviously derived from an affidavit submitted by the said Special Counsel, which affidavit was before both the District Court and the Court of Appeals. Furthermore, the finding itself does no more than note a contention of Special Counsel and identifies it as such.

Finding 10 commences with the words "The complaint alleges that . . . ." It continues with a reference to "papers submitted in support of Vesco & Co.'s motion to dismiss". The only statement in that finding which was not directly taken from petitioner's own papers is the final sentence which reads: "The ICC stock placed in Vesco & Co. by Vesco may be the only property from which a judgment against him may be satisfied" (72a, 91a).

Finding 11 includes three sentences in no way relevant to petitioner's present appeal. The only other part of that finding reads as follows: "On the papers before the Court it appears that Vesco & Co. is a corporate alter ego for defendant Robert Vesco and was created by him during and after the perpetration of the fraud charged in the

2. Reference to "Brief" are to petitioner's Brief.

complaint" (72a, 91a). We note that the Court of Appeals had before it the same papers which had been before the District Court and reached the same conclusion, to wit, that Vesco & Co. is a corporate *alter ego* for defendant Robert Vesco. As indicated above, this finding was wholly supported by facts in affidavits submitted by petitioner!

Finding 16 again includes several facts taken entirely from petitioner's own papers in support of its motion to dismiss. The only part of that finding which does not answer that description is the following: "Vesco & Co. is not a meaningful business entity whose day to day affairs would be interrupted by the injunction sought herein" (74a, 93a). We would note that the Court of Appeals reached the identical conclusion in its opinion and stated: "Moreover, as a holding company, Vesco & Co. will hardly experience any disruption in operations — an element to be considered by the District Court in evaluating the appropriateness of an asset freeze" (30a).

We find no instance of the so-called "blatant errors in the findings" charged by the petitioner herein (Brief p. 18). On the contrary, all of the factual statements made by the District Court were either taken directly from petitioner's own papers, or were findings to the effect that "Special Counsel *claims* to have found that . . . ," "the complaint *alleges* that . . . " and the like. We can see no possible basis in such findings for any claim of prejudice by the petitioner herein. Even more cogently, as the Court of Appeals pointed out in its opinion, there had been no hearing in the District Court, (both parties having waived one). The findings were all based upon affidavits and *documentary evidence*, all of which was before the Court

of Appeals as well as before the District Court, and most of which was *undisputed* or supplied by petitioner. It is for this reason that the Court of Appeals was able to reach the same conclusion as the District Court on the same record without intruding on the trial court's function in any way.

II.

THE COURT OF APPEALS DECISION AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTIONS TO DISMISS THE COMPLAINT ON THE BASIS THAT PETITIONER IS AN ALTER EGO OF DEFENDANT VESCO WAS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OR OF THIS COURT.

The first half of petitioner's argument that the complaint herein should have been dismissed on the ground that there was no independent basis for subject matter and personal jurisdiction, or for the valid service of process upon the petitioner, other than the "alter ego" finding, need not be dealt with here. We have no argument with the various legal propositions urged by the petitioner in that regard. Although we believe, and argued before the Court of Appeals, that there are theories of jurisdiction other than the "alter ego" theory which could be applied, the latter is the theory adopted by the Court of Appeals, and is therefore the theory which is at issue here.

The petitioner has cited three cases for the proposition that the Court of Appeals finding that Vesco & Co. is an *alter ego* of defendant Vesco has "contravened the principles established by other Courts of Appeals for the circumstances under which a corporate veil will be

pierced" (Brief, p. 22). It has cited two Courts of Appeals cases and one District Court case in this regard. We do not view these cases as being in conflict with the principles espoused by the Court of Appeals for the Second Circuit in the instant case.

Zubik v. Zubik, 384 F.2d 267 (3rd Cir. 1967), cert. denied, 390 U.S. 988 (1968), was an admiralty case which involved claims by owners of moored vessels to recover for damages caused by the drifting of barges, owned by the corporate defendant, which had broken from their moorings. The plaintiffs also sought to hold the major stockholder of the corporation personally liable for the damage. The Court found that the individual defendant had not been personally negligent with regard to the barges breaking loose, and found that there was no basis for ignoring the corporate entity in this instance. We submit that the *Zubik* case is in no way analogous to the facts of the case at bar. Furthermore, we consider that the portion of the opinion quoted by petitioner in his brief argues most cogently that the present case is one where a piercing of the corporate veil is appropriate. Petitioner has quoted the following portion of the opinion Brief, p. 23):

> "Unless done deliberately, with specific intent to escape liability for a specific tort or class of torts, the cause of justice does not require disregarding the corporate entity." (384 F.2d at page 273.)

We suggest that the District Court and the Court of Appeals found, on facts principally submitted by petitioner, that Vesco & Co. here was formed by Robert Vesco in order to safeguard and remove substantial assets of Robert Vesco from the reach of defrauded persons.

Petitioner also cites the case of *Plumbers & Fitters Local 761 v. Matt J. Zaich Construction Co.*, 418 F.2d 1054 (9th Cir. 1969). Petitioner suggests that this case is "directly analogous to the situation presented herein" and states that in that case, "the Court also refused to pierce the corporate veil where plaintiff showed only that the corporation in question had been formed solely for tax purposes. The Court refused to act where no showing was made that any wrongdoing had occurred" (Brief, p. 23).

Again we cannot see that this case is analogous to the present case. Here, petitioner has suggested that Vesco & Co. was contemplated as an estate planning device. However, the record, and particularly the affidavit of petitioner's counsel, shows that Vesco & Co. was in fact incorporated in 1972 during and after the period of the fraud alleged in the complaint herein.[3] We think it clear, in the circumstances, that there was a showing that wrongdoing has occurred, and that defendant Vesco transferred substantial assets to petitioner in connection with it. We might also note that the Court in the *Plumbers & Fitters* case, in discussing the doctrine of piercing the corporate veil stated that, "Generally speaking, the doctrine is designed to prevent a person from doing injury and then escaping responsibility by hiding behind the corporate shield." (418 F.2d at p. 1058)

Finally, petitioner relies on *In Re Penn Central Securities Litigation*, 335 F. Supp. 1026 (E.D. Penn. 1971). Again, we do not view this case as authority for petitioner's position here. In the *Penn Central* case the

3. As the Court of Appeals noted, a default judgment has been obtained against defendant Robert L. Vesco (28a).

situation involved the question of whether one company so controlled another company as to make the latter a mere instrumentality or conduit of the first. The Court in that case refused to disregard the separate corporate entity of the second company since it found that "the corporate form is not being used here to shield the corporation from its responsibilities or liabilities to the detriment of another" (335 F. Supp. at p. 1035). We submit that in the present case the corporate form of petitioner is quite clearly being used to shield defendant Vesco from his responsibilities and liabilities to the detriment of the respondent and its shareholders. The Court of Appeals for the Second Circuit concurred in this view.

The instant case does not involve the resolution of any conflicts between the Circuits on questions of law. The District Court and the Court of Appeals merely made a routine application of well-settled legal doctrines to the facts about the organization of Vesco & Co. by Robert Vesco, which facts were virtually undisputed. From those facts, the Courts below drew inferences which were dictated by logic and human experience and proceeded to act to preserve the *status quo* by enjoining the further transfer of assets. The inferences and conclusions drawn by the Courts below in deciding to grant the preliminary injunction might conceivably be susceptible of rebuttal and reversal at a plenary trial by the presentation of other evidence not before the Courts on the motions below. However, no proper occasion is presented on this record for certiorari to this Court to challenge the wisdom of the lower Courts' actions on the facts before them.

III.

THE COURT OF APPEALS AFFIRMANCE OF THE DISTRICT COURT'S GRANT OF AN INJUNCTION AGAINST THE DISPOSITION OF PETITIONER'S PRIMARY ASSET WAS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS OR OF THIS COURT.

Petitioner argues that the Court of Appeals for the Second Circuit erroneously affirmed the preliminary injunction against the disposition of the primary asset of petitioner in that respondent had not met its burden of proof and had not established the need for injunctive relief under the applicable standards of the case law.

We submit that this question should not even properly be the subject of a petition for writ of certiorari. Rule 19 of the Revised Rules of the Supreme Court, adopted June 15, 1970 as amended to June 15, 1974, states that "a review or writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor."

The character of the reasons which will be considered is set forth in Rule 19 and has been defined in numerous decisions over the years. One of the best discussions of the reasons for granting a petition for certiorari may be found in Justice Frankfurter's dissent in *Dick v. New York Life Insurance Company*, 359 U.S. 437 (1959).

Most in point, in light of petitioner's argument that the respondent did not meet its burden of proof below, Justice Frankfurter noted,

> "To undertake an independent review of the review by the Court of Appeals of evidence is neither our function nor within our special aptitude through constant practice." (359 U.S. at p. 461)

Petitioner here argues, in substance, that the decision of the District Court and the Court of Appeals was based upon insufficient evidence and an insufficient showing of the need for a preliminary injunction. We submit that, whatever the merits of this position may be, this question is not properly ground for the grant of a writ of certiorari.

However, we also maintain that petitioner has erroneously stated the criteria for the grant of a preliminary injunction, and that lower courts here properly applied the applicable standards of current case law.

Petitioner argues, in part, that "respondent cannot succeed in meeting its burden by mere assertions of irreparable injury" (Brief, p. 25). We suggest that the most recent enunciation of the criteria for the grant of a preliminary injunction here may be found in *Sonesta International Hotels Corp. v. Wellington Associates*, 483 F.2d 247 (2nd Cir. 1973). The Court there stated:

> "The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships

> tipping decidedly toward the party requesting the preliminary relief (citing cases)." (483 F.2d at p. 250)

As was clearly stated in its opinion, the Second Circuit here upheld the preliminary injunction on the basis of the second standard set forth in the *Sonesta* case. Its reasoning in so doing is clearly stated in its opinion (21a, 30a). [4]

The grant or denial of a preliminary injunction is generally considered to be within the sound judicial discretion of the Trial Court, and may only be disturbed on appeal if there has been a gross abuse of such discretion. The Court of Appeals not only failed to find such abuse, but reached the same conclusion as had the District Court on the basis of the same documentary evidence and statements submitted by petitioner.

In the circumstances, we can see no ground for granting a writ of certiorari to again re-examine the facts considered by both the District Court and the Circuit Court below.

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4. We might note that we do not agree with petitioner's statement that "all of the cases relied upon by the Court of Appeals granted injunctive relief only after extensive factual testimony or presentations had been made . . ." (Brief, p. 25). On the contrary, in *Sonesta*, the District Court rendered a decision after argument only, and without any kind of hearing.

CONCLUSION

For all of the foregoing reasons the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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